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No. 08-1371

IN THE

Supreme Court of the United States

CHRISTIAN LEGAL SOCIETY CHAPTER OF UNIVERSITY OF CALIFORNIA, HASTINGS COLLEGE OF THE LAW,
Petitioner,
v.
LEO P. MARTINEZ, ET AL., *Respondents*.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICUS CURIAE* ASSOCIATION OF AMERICAN LAW SCHOOLS IN SUPPORT OF RESPONDENT

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INTEREST OF THE *AMICUS CURIAE*[1]

Founded in 1900 to improve the legal profession through legal education, the Association of American Law Schools ("AALS") is a non-profit association of 171 public and private law schools, including Respondent, the University of California, Hastings College of the Law ("Hastings").[2] The core values of the AALS shape the efforts of the Association as well as define the obligations of its member schools. AALS Bylaw § 6-1. The core values emphasize both excellent teaching (across a rigorous and dynamic curriculum) and scholarship, noting its relationship to the creation and dissemination of knowledge. The core values also embody inter-related commitments to a self-governing academic community, to academic freedom, and to diversity of viewpoints. Member schools commit to support all of these objectives in an environment free of discrimination and rich in

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus* states that no counsel for a party authored this brief in whole or in part, and that no person other than *amicus curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. Respondent, Leo Martinez, Interim Dean of Hastings College of Law, is a member of the AALS Executive Committee; however, he has not participated in any way in the decision to seek to participate as *Amicus* or in the creation of this brief. Letters of consent to the filing of this brief from Petitioner and Respondent-Intervener Hastings Outlaw are being filed with this brief. Respondent Martinez's blanket letter of consent has been lodged with this court.

[2] The AALS is a voluntary association with requirements for membership widely regarded as indicators of a law school's quality. The Association does not serve an accreditation function.

diversity among faculty, staff, and students. The core values are framed by the idea that institutional autonomy should be honored whenever possible because wide latitude will encourage the development of strong and effective educational programs and learning communities. The core values combine to provide an environment where students have the opportunity to study law in an intellectually vibrant institution capable of preparing them for professional lives as lawyers instilled with a sense of justice and an obligation of public service.

Of specific relevance to the case before this Court, each AALS Member school undertakes to "provide equality of opportunity in legal education for all . . . enrolled students . . . without discrimination or segregation on the ground of race, color, religion, national origin, sex, age, disability, or sexual orientation." AALS Bylaw § 6-3(a). Based on their expertise in legal education and familiarity with their own learning environments, AALS Member schools take varied approaches to student organizations. Some schools do not mandate nondiscrimination rules or open-membership policies for all student organizations, while others have exercised their institutional autonomy to make a judgment of the sort embodied in the Hastings policy. A decision to constitutionalize this area of sensitive educational judgment would rigidify the policy choices of state-supported AALS member schools, and thereby undermine the principles to which the AALS and its members are committed.

SUMMARY OF ARGUMENT

In addition to ensuring compliance with federal, state, and local law, the application of a law school's

nondiscrimination policy to registered student organizations can play a vital pedagogical function. Legal education is not simply a matter of classroom learning but also of learning by doing. To train lawyers for their dual role as zealous advocates and officers of the law, legal educators must have the space to make the policy judgment that students *practice,* rather than merely hear about, nondiscrimination. In making just that judgment, Hastings transgressed no constitutional boundaries.

This is not a case in which government has sought to dictate the membership of an expressive association. Rather, this is a case about a state university's ability to decide whether to spend scarce funds on, and dispense other benefits to, organizations that engage in illicit discrimination. As the parties have stipulated, Hastings conditions official recognition and funding for student organizations on their compliance with an open-membership (or "all-comers") rule. *See* Pet. App. 2a. That rule is a constitutional means of avoiding participation by Hastings in discriminatory conduct.

This Court has looked to its forum doctrine to evaluate conditions on expression in programs of official recognition and financial support for student organizations at public institutions of higher learning. *See Bd. of Regents of the Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217 (2000); *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819 (1995). Under that doctrine, a government policy that limits the access of individuals or groups to the benefits of a limited forum is permissible if it is "reasonable in light of the purpose served by the forum and . . . viewpoint neutral." *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384,

392-93 (1993) (quoting *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 806 (1985)).

Accordingly, this case poses two questions about the Hastings policy of granting official recognition and the tangible benefits that go with it only to student groups that abide by its all-comers rule. First, is the rule viewpoint-neutral? Second, is it reasonable? The answer to both questions is yes.

The Hastings rule is viewpoint-neutral. It singles out no expression whatsoever. Instead, it imposes a blanket rule of conduct upon all student groups seeking official recognition. The American Constitution Society and the Federalist Society, the Black Law Students Association and the Chinese Law & Culture Society, the Ballroom Dance Club and the Cycling League, all must abide by the all-comers rule in admitting members and leaders.

The Hastings policy is also reasonable. Having endorsed a policy of nondiscrimination and having admitted a diverse student body, Hastings has decided that official recognition and school resources should not then be bestowed on student groups that illicitly discriminate or otherwise exclude prospective student members. Other schools may choose different means to implement their nondiscrimination policies or to avoid subsidizing exclusion of students, but that casts no doubt on the reasonableness of the means Hastings has chosen.

Nothing in this Court's expressive association cases leads to a contrary conclusion. In *Boy Scouts of America v. Dale*, 530 U.S. 640, 659 (2000), this Court held that government in its *regulatory capacity* may not compel an expressive association to accept members or leaders whose membership or leadership would undermine the association's message. *See also*

id. ("New Jersey's public accommodations law *directly* and immediately affects associational rights . . . .") (emphasis added); *Hurley v. Irish-American Gay, Lesbian, & Bisexual Group of Boston*, 515 U.S. 557, 579 (1995) ("[A] speaker who takes to the street corner to express his views in this way should be *free from interference by the State* based on the content of what he says.") (emphasis added).

A decision to deny funding and recognition to a student organization that excludes putative members in violation of a viewpoint-neutral policy is not in any sense a *direct* infringement on, or *interference* with, associational rights. To extend the principles of *Hurley* and *Dale* into the domain of government benefits in limited public fora would be to convert the First Amendment from a right against government interference into a right to government support.

To recognize the right Petitioner seeks would thus jeopardize government power to withhold subsidies from organizations that refuse to comply with reasonable conduct rules. It would call into question a wide range of educational policy judgments, from the requirement that student groups have faculty advisors to the requirement that they consist of students. *See* Eugene Volokh, *Freedom of Expressive Association and Government Subsidies*, 58 STAN. L. REV. 1919, 1941-44 (2006). Indeed, Petitioner's new right would even jeopardize nondiscrimination rules that the state and federal governments routinely apply to private, non-profit, and religious recipients of aid for social services. At the very least, a ruling for Petitioner would invite decades of litigation over the question of when an expressive association that receives government

largess is privileged to disregard conditions forbidding discrimination that the government has attached to the benefit at issue.

There is no reason to go down that road. Straightforward application of this Court's existing limited forum doctrine leads to the inescapable conclusion that the viewpoint-neutral Hastings policy at issue here is reasonable, and thus constitutional. Respect for the "educational autonomy" of institutions such as Hastings is itself a principle rooted in the First Amendment. *Grutter v. Bollinger*, 539 U.S. 306, 329 (2003). This Court should resist Petitioner's plea to formulate a one-size-fits-all constitutional rule that would displace the diverse judgments of state educational institutions and other government actors around the country.

ARGUMENT

I. THE HASTINGS "ALL-COMERS" RULE IMPLEMENTS THE SCHOOL'S NONDISCRIMINATION POLICY

The parties have stipulated "that Hastings imposes an open membership rule on all student groups—all groups must accept all comers as voting members . . . ." Pet. App. 2a. However, Petitioner argues in this Court that Hastings does not enforce its policy uniformly, and is thus engaged in viewpoint discrimination. *See* Brief for Petitioner at 12-14, 39-40. If this Court believes that the record reveals a genuine issue of material fact about whether Hastings has engaged in viewpoint discrimination, then the writ should be dismissed as improvidently granted. The law already establishes that a state university cannot discriminate based on

viewpoint in deciding which student organizations to officially recognize and fund.

Should this Court instead treat the stipulation as binding, it would do best to understand the all-comers rule as the district court did—as the mechanism through which Hastings enforces its nondiscrimination policy. *See* Pet. App. 12a-13a.[3] The all-comers rule allows Hastings to avoid making difficult judgments about subjective motive when a student complains about exclusion based on an illicit criterion. As explained below in Part V, an all-comers policy has other benefits as well. Most obviously, it ensures that organizations funded through student activities fees collected from all students are open to all students.

In any event, the balance of this brief shows why both the actual all-comers rule to which the parties stipulated and the non-discrimination policy that it serves are constitutional.

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[3] Religious organizations may have unique grounds for a legislative exception from a statutory prohibition on discrimination on the basis of religion. *See* 42 U.S.C. § 2000e-1(a) (exempting religious employers from Title VII's prohibition on religious discrimination). In this case, however, Hastings would have denied recognition and funding to Petitioner based on its failure to comply with the all-comers policy and its discrimination based on sexual orientation, regardless of Petitioner's discrimination based on religion. Thus, Petitioner is entitled to no special sympathy on the basis of its religious character, much less a constitutionally mandated exemption from the Hastings policy. *See Employment Div. v. Smith*, 494 U.S. 872 (1990).

II. THE HASTINGS POLICY INCULCATES VITAL NORMS OF THE LEGAL PROFESSION

This Court has long recognized that universities play a special role in our constitutional order. As the Court noted over half a century ago:

> The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation.

Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957) (plurality opinion), later quoted in *Keyishian v. Bd. of Regents of Univ. of State of N.Y.* 385 U.S. 589, 603 (1967).

Accordingly, courts will not lightly interfere with the pedagogical choices of educators. Yet those choices must be understood broadly, for law schools—like other university units—do not operate in an "academic vacuum." *Sweatt v. Painter*, 339 U.S. 629, 634 (1950). Nor does a university discharge its educative function solely in the classroom. Student organizations play a vital role in the life of any institution of higher education, even if not strictly part of the curriculum. Participation in organized student life enables students to join and build networks that may blossom into future career opportunities, *cf. United States v. Virginia*, 518 U.S. 515, 551-53 (1996), or simply to forge the sorts of bonds that are essential to health and happiness.

See Robert D. Putnam, *Bowling Alone: The Collapse and Revival of American Community* 326-35 (2000).

Officially recognized extracurricular organizations take on special significance in a law school, as confirmed by a highly influential recent study of legal education. *See* William M. Sullivan, et al., *Educating Lawyers: Preparation for the Profession of Law* (2007) (hereinafter "Carnegie Report"). The Carnegie Report emphasized that law schools must teach students not only how to think like lawyers but also how to perform like them. *See id.* at 22. Inculcating norms of professional conduct is especially important because "professions have been given significant grants of public trust." *Id.* at 21. In exchange, members pledge themselves "to ideals of service to their clients and the public as a whole." *Id.*

Lawyers must balance zealous advocacy on behalf of clients against the obligation to serve as officers of the law committed to the general welfare. Law schools play a profoundly important role in training students to navigate these potentially conflicting obligations to a client's interest and the public good. Imparting norms of professional conduct, not surprisingly, often goes beyond abstract instructional exercises to include learning by doing. Law schools have increasingly relied on methods of education that anchor the lessons of professionalism in concrete experience, such as live-client clinics and externships. Even so, teaching professionalism remains a challenging task, very often imparted as much by example as by exhortation.

Extracurricular activities thus play a key role in the law school learning process. As this Court recognized six decades ago, the benefits of such

activities are "incapable of objective measurement but . . . make for greatness in a law school." *Sweatt*, 339 U.S. at 633-34. Likewise, the latest report of the Law School Survey of Student Engagement finds that participation in student groups and activities ensures that first-year law students feel like full members of the learning community. Second- and third-year students use these opportunities to develop their professional identities as well as to burnish their resumes. Across the board, students who are involved in extracurricular activities report higher levels of engagement in the legal educational experience. *See* Law School Survey of Student Engagement, *Student Engagement in Law School: Enhancing Student Learning—2009 Annual Survey Results* at 12-13.

Because extracurricular activities play such a significant role in the learning process, Hastings is permitted to make pedagogical judgments about how recognized student organizations can best be structured to promote an inclusive learning environment and to teach standards of professional conduct. By adopting a principle of nondiscrimination in membership decisions, Hastings advances both of these goals.

To read the First Amendment as exempting Petitioner from the Hastings policy would seriously undermine the ability of Hastings and countless other institutions to advance their pedagogical goals. Petitioner's claimed exemption from the Hastings policy is not, and cannot logically be, limited to religious organizations or prohibitions on sexual orientation discrimination. Under Petitioner's expressive association theory, a white supremacist student organization that excludes African-American

students and a male chauvinist club that excludes female students would each be entitled to official recognition and funding.

In applying its policy notwithstanding such claims, Hastings asserts interests that this Court has previously recognized as vital. Illicit segregation can deprive students of important opportunities to learn from peers by engaging their differences as well as their commonalities. *See Parents Involved in Cmty. Sch. v. Seattle Sch. Dist.*, 551 U.S. 701, 722-25 (2007); *Grutter v. Bollinger*, 539 U.S. 306, 328-32 (2003); *Regents of the Univ. of Ca. v. Bakke*, 438 U.S. 265, 311-15 (1978). "Under our Constitution the individual, child or adult, can find his own identity, can define her own persona, without state intervention that classifies on the basis of his race or the color of her skin." *Parents Involved*, 551 U.S. at 797 (Kennedy, J., concurring in part and concurring in the judgment). Group membership rules, no less than "the choices the state makes in grouping individuals[,] will affect the choices individuals make in expressing their identity." Heather K. Gerken, *Justice Kennedy and the Domains of Equal Protection*, 121 Harv. L. Rev. 104, 120 (2007).

Recognizing that student organizations play a critical role in the education of law students, Hastings has chosen to ensure equal educational access to this experience for all students. As this brief next demonstrates, that choice clearly falls within constitutional bounds.

III. A STATE UNIVERSITY SATISFIES THE FIRST AMENDMENT WHERE IT BASES THE DECISION TO DENY OFFICIAL RECOGNITION AND FUNDING TO A STUDENT ORGANIZATION ON REASONABLE, VIEWPOINT-NEUTRAL GROUNDS

The Hastings policy is solely a limit on the *conduct* of student groups that receive official recognition and funding. Accordingly, the district court concluded that the policy should be judged under the relatively forgiving test for conduct regulations that have the incidental effect of burdening speech. *See United States v. O'Brien*, 391 U.S. 367 (1968); Pet. App. 24a. In failing even to cite *O'Brien*, Petitioner tacitly admits, as it must, that the Hastings policy satisfies the *O'Brien* test.

This Court need not choose between the *O'Brien* test and the forum analysis that it has used in other cases involving official recognition and funding of student organizations, however, because even under the latter, more demanding approach, the Hastings policy withstands constitutional scrutiny. This Part describes the contours of forum analysis; the next two Parts demonstrate why the Hastings policy readily satisfies it.

Board of Regents of the University of Wisconsin System v. Southworth, 529 U.S. 217 (2000), and *Rosenberger v. Rector & Visitors of the University of Virginia*, 515 U.S. 819 (1995), show that state universities, as government actors, have a duty not to censor. But a neutral policy that has the incidental effect of burdening speech or expressive association does not run afoul of that duty.

Southworth involved a challenge to an activities fee by University of Wisconsin students who objected to the allocation of portions of the fee to expressive activities conveying messages with which they disagreed. This Court treated its "public forum cases" as "instructive . . . by close analogy." 529 U.S. at 229-30. In the typical public forum case, a speaker objects to exclusion from some tangible or intangible government property or benefit. But whether the issue is exclusion of speakers or government use of funds, and whether the forum is "geographic" or "metaphysical," *Rosenberger*, 515 U.S. at 830 (citing *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46-47 (1983); *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 801 (1985)), the First Amendment test is the same. In a limited forum, "[t]he State may not exclude speech where its distinction is not reasonable in light of the purpose served by the forum, nor may it discriminate against speech on the basis of its viewpoint." *Rosenberger*, 515 U.S. at 829 (citations and internal quotation marks omitted). *Accord Southworth*, 529 U.S. at 233-34.

This Court's first foray into student organization objections to university rules confirms and illustrates the central role of viewpoint neutrality in this context. In *Healy v. James*, 408 U.S. 169 (1972), a Connecticut state college president denied recognition to a local affiliate of Students for a Democratic Society ("SDS"), and as a result, the students were excluded from a range of privileges. This Court found that the students had sufficiently stated a First Amendment claim, but only because the president's grounds for denying recognition to the student group were unclear in the record. "The

mere disagreement of the President with the group's philosophy," the Court explained, would have afforded "no reason to deny it recognition." *Id.* at 187. However, this Court drew a crucial line between viewpoint-based and viewpoint-neutral grounds for withholding recognition from the SDS chapter: If the president's nonrecognition decision were "directed at the organization's activities rather than its philosophy," the Court reasoned, that would be permissible. *Id.* at 188. The Court concluded this line of reasoning as follows: "Associational activities need not be tolerated where they infringe reasonable campus rules, interrupt classes, or substantially interfere with the opportunity of other students to obtain an education." *Id.* at 189. Accordingly, the Court remanded the case for a determination of whether the basis for nonrecognition was the SDS philosophy or the possibility that the student members were unwilling to comply with reasonable, viewpoint-neutral campus rules. *See id.* at 193-94.

Healy thus teaches that a state college or university may not deny official recognition and concomitant privileges to a student association on the basis of its viewpoint; conversely, a putative student association's unwillingness to abide by reasonable, viewpoint-neutral rules supplies a sufficient basis for nonrecognition. Subsequent cases simply apply these basic principles. *See Southworth*, 529 U.S. at 233-34; *Rosenberger*, 515 U.S. at 829.

IV. THE HASTINGS POLICY IS VIEWPOINT-NEUTRAL

This Court's prior association cases confirm that nondiscrimination rules and, *a fortiori*, all-comers rules, are viewpoint-neutral. For example, in

Roberts v. United States Jaycees, 468 U.S. 609 (1984), this Court found that a law forbidding discrimination on the basis of "race, color, creed, religion, disability, national origin or sex" did "not distinguish between prohibited and permitted activity on the basis of viewpoint." *Id.* at 615, 623. Likewise, in *Board of Directors of Rotary International v. Rotary Club of Duarte*, 481 U.S. 537 (1987), this Court allowed that a California nondiscrimination law that forbade a civic organization from rejecting prospective members on the basis of sex made "no distinctions on the basis of the organization's viewpoint." *Id.* at 549; *see also Wisconsin v. Mitchell*, 508 U.S. 476, 487 (1993) (unanimously holding that a law providing an enhanced sentence because the defendant selected his victim based on race did not target expression or thought).

Thus, the Hastings policy is viewpoint-neutral. Unlike the government policies invalidated in *Rosenberger v. Rector & Visitors of the University of Virginia*, 515 U.S. 819 (1995), *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384 (1993), and *Widmar v. Vincent*, 454 U.S. 263 (1981), neither the all-comers rule nor the underlying nondiscrimination policy singles out messages of any sort. The challenged rule is not only viewpoint-neutral; it is content-neutral; indeed, it is *expression-neutral*, a condition on the *conduct* of officially recognized and funded student organizations, not on their *expression*.

The interest Hastings asserts in avoiding underwriting discrimination does not in any way undermine that conclusion. This is not a matter of Hastings distancing itself from the *message* of

Petitioner or any other student organization. Rather, Hastings aims to avoid *participating in the conduct of discrimination* in much the same way that the federal government aimed to avoid participating in the racially discriminatory policies of universities receiving favorable tax treatment in *Bob Jones University v. United States*, 461 U.S. 574 (1983).

Crucially, the all-comers rule does not target expression. Hastings law students individually and collectively have a First Amendment right to believe and say that homosexual conduct is sinful or that all sexual activity outside heterosexual marriage is sinful, but when Hastings students attempt to exclude "unrepentant" gay and lesbian students from membership in a student organization on the basis of those views, they are not merely speaking but acting.[4] Accordingly, the Hastings policy satisfies the viewpoint-neutrality requirement of this Court's limited forum cases.

V. THE HASTINGS POLICY IS REASONABLE

This Court has repeatedly upheld as reasonable, laws and policies that were substantially more restrictive of speech than the Hastings policy at issue here. These include: a requirement that nonmembers of a collective bargaining unit opt in to

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[4] Citing Justice O'Connor's concurrence in *Lawrence v. Texas*, 539 U.S. 558, 583 (2003), the district court found that Petitioner's willingness to accept "repentant" gay and lesbian members but not those who engage in or advocate homosexual conduct to be "a distinction without a difference." Pet. App. 22a n.2. Even if one thought that distinction meaningful, the Hastings policy of forbidding exclusions based on homosexual conduct would still be expression-neutral and, *a fortiori*, viewpoint-neutral.

permit the union to spend agency-shop fees on election activities, *see Davenport v. Wash. Educ. Ass'n*, 551 U.S. 177, 189-90 (2007); the exclusion of an independent candidate with little popular support from a debate on a state-owned public television station, *see Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 682-83 (1998); a ban on solicitation on postal premises, including abutting sidewalks, *see United States v. Kokinda*, 497 U.S. 720, 732-36 (1990); the exclusion of legal defense and advocacy organizations from a government-sponsored charity drive, *see Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 808-09 (1985); and the grant of access to workplace mailboxes for the workers' bargaining representative but not a rival union, *see Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 50-52 (1983).

"The Government's decision to restrict access . . . need only be *reasonable;* it need not be the most reasonable or the only reasonable limitation." *Cornelius*, 473 U.S. at 808. Moreover, viewpoint-neutrality itself goes a long way towards establishing reasonableness. In most of the foregoing cases, the absence of credible evidence of censorial motives played a substantial role in the Court's finding of reasonableness. *See*, *e.g.*, *Davenport*, 551 U.S. at 190 ("Quite obviously, no suppression of ideas is afoot . . ."); *Ark. Educ. Television Comm'n*, 523 U.S. at 683 ("There is no substance to Forbes' suggestion that he was excluded because his views were unpopular or out of the mainstream."); *Kokinda*, 497 U.S. at 736 ("Clearly, the regulation does not discriminate on the basis of content or viewpoint.").

Only rarely has this Court found that a viewpoint-neutral restriction on speech in a

nonpublic or limited forum was unreasonable, and in those instances the challenged law was both targeted at speech and profoundly overbroad. Thus, in *Board of Airport Commissioners of City of Los Angeles v. Jews for Jesus, Inc.*, 482 U.S. 569 (1987), this Court found it unnecessary to determine whether an airport was a public forum, *see id.* at 573-74, where the challenged policy expressly forbade all "First Amendment activities" in the airport. *Id.* at 570.

Likewise, in a pair of cases also involving speech at an airport, different majorities of this Court held that: (a) the public portions of the airports in the New York metropolitan area were not public fora; but that (b) a ban on leafleting in these public areas was nonetheless invalid as unreasonable. *See Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672 (1992) ("*ISKC I*") (not a public forum); *Lee v. Int'l Soc'y for Krishna Consciousness, Inc.,* 505 U.S. 830 (1992) (*per curiam*) (invalidating leafleting ban). The controlling opinion was authored by Justice O'Connor, who thought that the leafleting ban was unreasonable, but that a solicitation ban was reasonable. *See ISKC I*, 505 U.S. at 685 (concurring in part and concurring in the judgment in part).

By contrast with the speech bans invalidated in *Jews for Jesus* and *ISKC I*, the Hastings policy at issue here does not even target expressive activities. In that regard, its reasonableness follows *a fortiori* from the reasonableness of the challenged laws and policies this Court has previously upheld that did directly limit expression.

Indeed, the Hastings policy is not merely reasonable. It furthers the state's vital interests in preventing, and avoiding participation in, discrimination. *Cf. City of Richmond v. J.A. Croson*

Co., 488 U.S. 469, 492 (1989) (crediting government's interest in avoiding becoming a "passive participant" in racial exclusion). Notably, whether or not Petitioner admits it, the arguments advanced by Petitioner would apply with equal force to an organization that, on religious or ideological grounds, wished to exclude student members who were engaged in "unrepentant" interracial dating, *cf. Bob Jones Univ. v. United States*, 461 U.S. 574 (1983), but sought official recognition and funding despite thereby violating the Hastings nondiscrimination policy and all-comers rule.

In *Healy v. James*, 408 U.S. 169 (1972), this Court recognized that a state educational institution could constitutionally insist that student organizations abide by "reasonable campus rules" as the price of official recognition and eligibility for funding. *Id.* at 189. Such rules include prohibitions of the sort of violence forbidden by the criminal code, but "[i]n the context of the 'special characteristics of the school environment,' the power of the government to prohibit 'lawless action' is not limited to acts of a criminal nature." *Id.* (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 513 (1969)).

Surely, a nondiscrimination policy counts as a reasonable rule. Prohibitions on discrimination afford "protections taken for granted by most people either because they already have them or do not need them." *Romer v. Evans*, 517 U.S. 620, 631 (1996).

Likewise, enforcing a nondiscrimination policy through an all-comers rule is reasonable. This indirect approach has an important practical advantage over direct enforcement of a nondiscrimination rule: enforcement of an all-comers

policy does not depend on proving subjective intent to discriminate. And that is to say nothing of the other legitimate pedagogical ends an all-comers policy serves—including ensuring that funds raised from all students be available only for organizations open to all students. Thus, other law schools have also adopted all-comers rules.[5]

Even accepting Petitioner's claim that under the Hastings policy the Democratic Club would have to accept Republicans and the pro-life club would have to accept pro-choice members to receive subsidies and official recognition, *see* Brief for Petitioner at 15, the policy is reasonable. The reasonableness inquiry asks whether "the restriction [is] 'reasonable in light of the purpose served by the forum.'" *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 106 (2001)

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[5] The AALS does not collect information on law school policies regarding membership in registered student organizations, and law schools do not routinely make such policies publicly available. Three schools that do publish their polices on the internet, and list all-comers rules, are: Georgetown University Law Center, Hofstra Law School, and Capital University Law School. *See* Georgetown Law, Office of Student Life: Student Organizations, http://www.law.georgetown.edu/studentlife/StudentOrgs/NewGroup.htm; *Hofstra Law School Student Handbook 2009-2010*, at 49, *available at* http://law.hofstra.edu/pdf/StudentLife/StudentAffairs/Handbook/stuhb_handbook.pdf; *Capital University Law School Student Organization Handbook* 2008-2009, Rule 2.3-1, *available at* https://culsnet.law.capital.edu/StudentOrganizations/Handbook/HANDBOOKFINAL.pdf. Columbia Law School's Student Senate By-Laws allow for "reasonable" exceptions to its all-comers rule, but specifically disallow exceptions from the nondiscrimination policy. *See* Columbia Law School Student Senate By-Laws § 6.B.3, *available at* http://www.columbia.edu/cu/law/senate/docs/constitution.pdf.

(quoting *Cornelius*, 473 U.S. at 806). Participation in recognized student organizations affords Hastings students opportunities to freely exchange ideas and develop a professional identity. Requiring that all organizations be open to all interested students directly furthers these goals. If an all-comers rule had the collateral consequence of encouraging students to join organizations in order to sabotage them, that fact would be relevant to a school's institutional decision whether to modify the rule or otherwise discourage such sabotage, but it would not bear on the reasonableness of the rule's adoption in the first place.

In any event, the record contains no evidence that any Hastings student organization has ever been sabotaged by students who disagree with its fundamental aims. Petitioner and its amici cite a handful of examples of this phenomenon at *other* institutions, but none at Hastings itself. *See* Brief for Petitioner at 29 n.4; Brief of Amici Curiae, Foundation for Individual Rights in Education and Students for Liberty at 8-12. Given this experience with the rule, the Court should not second-guess Hastings' judgment about its pedagogical utility. Petitioner's invocation of the specter of hypothetical saboteurs falls far short of demonstrating that the Hastings policy is substantially overbroad. *See Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973). The policy, on its face and as applied to Petitioner, is reasonable.

VI. EXTENDING THIS COURT'S EXPRESSIVE ASSOCIATION PRECEDENTS INTO THE DOMAIN OF GOVERNMENT BENEFITS WOULD CONVERT THE FIRST AMENDMENT FROM A RIGHT AGAINST GOVERNMENT INTERFERENCE INTO A RIGHT TO GOVERNMENT SUPPORT

Constitutional rights, including the right to free speech and freedom of association, are rights against government interference rather than rights to government assistance. *See, e.g.*, *Rust v. Sullivan*, 500 U.S. 173, 198-200 (1991); *Christian Legal Soc'y v. Walker*, 453 F.3d 853, 873 (7th Cir. 2006) (Wood, J., dissenting) ("The Supreme Court has often drawn a line between rules that compel conduct and rules that merely withhold benefits."); Eugene Volokh, *Freedom of Expressive Association and Government Subsidies*, 58 Stan. L. Rev. 1919, 1944 (2006). Of course, the government's ability to condition a private actor's receipt of benefits on conformity with various conduct rules is not unlimited, but where the conditions at issue arise out of a limited forum, this Court's doctrines concerning such fora express the appropriate limits. *See Rust*, 500 U.S. at 199-200. Those limits consist in the requirements of viewpoint-neutrality and reasonableness, which, as this brief has shown, the Hastings policy satisfies.

Petitioner seeks to avoid that ineluctable conclusion by asking this Court to dramatically alter its limited forum doctrine. Petitioner would have this Court apply the distinct constitutional principle exempting expressive organizations from *direct regulation of their membership*, where such regulation substantially impairs an organization's ability to control its message. But that principle has

never been applied by this Court in cases involving access to government facilities or funds, and for good reason: the very notion of a limited forum for membership organizations implies limits on membership criteria that are incompatible with the right Petitioner asks this Court to invent.

Hurley v. Irish-American Gay, Lesbian, & Bisexual Group of Boston, 515 U.S. 557 (1995), is instructive. There the Court acknowledged the state's valid interest in its public accommodations law as a successor to the common law right to commercial service. *See id.* at 571. However, the application of a public accommodations law raised a distinct issue of government interference with expressive association. As this Court explained: "Our tradition of free speech commands that a speaker who takes to the street corner to express his views in this way should be *free from interference by the State* based on the content of what he says." *Id.* at 579 (emphasis added). *Accord Boy Scouts of America v. Dale*, 530 U.S. 640, 659 (2000) ("The state interests embodied in New Jersey's public accommodations law do not justify such a *severe intrusion* on the Boy Scouts' rights to freedom of expressive association.") (Emphasis added).

Here, in marked contrast, Petitioner cannot complain about the state's *interference* with or *intrusion* on its right to affirm its views about religion or sexual morality without that message being undermined by the participation of unwanted members because this is not a case about state interference or intrusion. Instead, this is a case about the withholding, on viewpoint-neutral grounds, of state benefits from a putative

organization that would violate the Hastings non-discrimination policy and all-comers rule.

To be sure, *Hurley* involved a special kind of government benefit: the right to hold a parade. But holding a parade on a public street is a matter of access to a *traditional* public forum to which individuals and groups have a freestanding right. Limits on access to traditional public fora are tantamount to direct regulations of speech and association. *See Pleasant Grove City v. Summum*, 129 S. Ct. 1125, 1132 (2009).

Consequently, *Hurley* has no bearing on a case such as this one, in which only the narrower right against unreasonable and viewpoint-based restrictions applies. "A university differs in significant respects from public forums such as streets . . . . A university's mission is education, and decisions of this Court have never denied a university's authority to impose reasonable regulations compatible with that mission upon the use of its campus and facilities." *Widmar v. Vincent*, 454 U.S. 263, 269 (1981).

Petitioner's proposed application of principles developed in the context of direct regulation and public parades would lead to a parade of horribles all too real. It would wreak havoc with the First Amendment law governing educational institutions and beyond. Consider just a small sample of the wide range of educational policies that would be jeopardized by the constitutional rule Petitioner asks this Court to fashion.

Many public universities require, as a condition of official recognition, that a student organization find a faculty or staff member willing to serve as its

advisor.[6] Such requirements ensure that a responsible university official supervises the group's activities for the protection of the students themselves, the university, and the broader community. In particular settings, a faculty advisor requirement may also ensure that student organizations pursue activities consistent with the institution's educational mission. Yet in any particular institution, a small group of students with unpopular or simply idiosyncratic views may have difficulty attracting any faculty or staff member willing to give his or her time to the cause. Or, if the student group's activities and ideas are sufficiently idiosyncratic, no faculty or staff member may support them. Does it violate the right to expressive association to condition official recognition and funding for a small group of students on their acceptance of an otherwise willing faculty advisor who does not fully believe in, or behave in accordance with, every item in their statement of faith or principles?

Next consider that, as a neutral means of allocating scarce space and resources, many state educational institutions require that a student group seeking official recognition have some minimum

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[6] Among the institutions requiring a faculty or staff advisor are the University of Oklahoma, Texas A&M University, the University of Cincinnati, the University of West Virginia, the University of Texas at Dallas, and Mississippi State University. *See* http://studentlife.ou.edu/content/view/225/173; http://studentactivities.tamu.edu/orgmanual/recognition#nso; http://www.uc.edu/sald/Student_Organizations/default.html; http://student.wvstateu.edu/union/advisor.pdf; http://www.utdallas.edu/orgs/manual/02/; http://www.msstate.edu/dept/audit/91200.html.

number of members.[7] Such policies are both viewpoint-neutral and reasonable. Yet they have the incidental effect of disadvantaging small, potentially unpopular groups of students seeking official recognition and funding. Or perhaps worse from Petitioner's perspective, a small group of students seeking official recognition may have to accept as members some other students who do not entirely share their views in order to reach the numerical threshold. Do minimum-membership requirements also succumb to Petitioner's newly minted constitutional rule?

Furthermore, if Petitioner is correct that the right to expressive association requires exemptions from reasonable, viewpoint-neutral requirements for official recognition and funding, then that right could also be invoked to invalidate policies that deny official recognition and benefits to organizations that *include* certain prospective members. After all, the line of expressive association cases from which Petitioner would export the *Dale* rule begins with, and certainly still includes, a right *to associate*, not merely a right *not to associate*. *See NAACP v. Alabama*, 357 U.S. 449, 460-66 (1958). Here too, what Petitioner requests would dramatically expand the role of the courts in supervising the management of educational institutions.

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[7] The University of New Mexico, the University of Oklahoma, and the University of Cincinnati each requires that an official student organization have at least ten members. *See* http://pathfinder.unm.edu/policies.htm#charteredstudentorg; http://studentlife.ou.edu/content/view/225/173; http://www.uc.edu/sald/Student_Organizations/default.html. The University of Iowa requires at least five members. http://imu.uiowa.edu/start-a-student-organization/.

For example, to ensure that students with marginal academic records devote needed time to their studies before immersing themselves in extracurricular activities, some public colleges and universities—not to mention public high schools—require students to maintain a minimum grade point average in order to participate in or lead student organizations.[8] Despite their viewpoint-neutrality and obvious educational value, such requirements would be vulnerable under Petitioner's proposed constitutional rule whenever they prevent like-minded students from receiving state subsidies and assembling under official auspices.

Indeed, even rules requiring that student organizations consist of, or be led by, enrolled students, would be vulnerable to Petitioner's attack. Such rules are viewpoint-neutral and reasonable, pursuing the sensible goal of reserving institutional resources for members of the institutional community; yet they undoubtedly could incidentally affect student groups that wish to associate with outsiders as part of their message. *See* Volokh, 58 Stan. L. Rev. at 1940 (describing plausible

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[8] At the University of Cincinnati, eligibility for leadership positions requires a minimum GPA of 2.0. *See* http://www.uc.edu/Trustees/Rules/RuleDetail.asp?ID=178. For University of Florida undergraduates, the leadership GPA threshold is 2.5, while for graduate students it is 3.0. *See* http://www.union.ufl.edu/involvement/studentOrgs/handbook/contents/3.asp. At West Virginia State University, new members of student organizations must have at least a 2.3 GPA. *See* http://student.wvstateu.edu/union/advisor.pdf.

ideological grounds for desired association with outsiders).

Finally, the chaos that would be unleashed by adoption of Petitioner's proposed radical expansion of the *Dale* principle could not be limited to the educational setting but would threaten to unravel government benefits more broadly. For example, the federal government administers various programs of social services through grants to community organizations, including religiously affiliated ones. Utilizing such existing charitable entities and their public-spirited volunteers has obvious advantages over distribution through government bureaucracies. In order to ensure equal access for beneficiaries, current federal law bars participating organizations from discriminating on various enumerated grounds.[9] Likewise, the Ohio school voucher program upheld by this Court against an Establishment Clause challenge in *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), forbade participating schools from discriminating on racial or other grounds. *See id.* at 645. Suppose that an otherwise qualified organization would, on grounds of freedom of expressive association, deny services to potential recipients based on legally proscribed grounds. Existing precedents make clear that the government can require compliance with a rule of non-discriminatory service. However, under Petitioner's proposed constitutional rule, such vital

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[9] *See* Participation in Department of Health and Human Services Programs by Religious Organizations; Providing for Equal Treatment of All Department of Health and Human Services Program Participants, 69 Fed. Reg. 42,586, 42,591 (July 16, 2004) (to be codified at 45 C.F.R. pts. 74, 87, 92, 96).

limits on faith-based services and school vouchers would be vulnerable to challenge as unconstitutional infringements on expressive association.

In short, Petitioner's proposal to force the right of expressive association recognized in direct regulation cases onto the Procrustean bed of limited forum doctrine is both inconsistent with the latter and threatens to undermine the institutional autonomy of state decision makers in a wide range of settings. It would usher in decades of legal confusion and litigation. The Hastings policy satisfies the existing constitutional requirements of viewpoint-neutrality and reasonableness. That is enough.

CONCLUSION

For the foregoing reasons, the judgment below should be affirmed.

Respectfully submitted,[10]

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